No. 82-1474

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN, ROBERT D. MYERS and HAROLD J. WOLFINGER,

Petitioners,

vs.

EDWARD RONWIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

I. WAS THE GRADING PROCEDURE EMPLOYED BY PETITIONERS FOR THE FEBRUARY, 1974 ARIZONA STATE BAR EXAMINATION CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED BY THE STATE OF ARIZONA ACTING AS SOVEREIGN; AND, IF SO,DID THE SOVEREIGN ACTIVELY SUPERVISE THE GRADING?

II. ON THE ASSUMPTION, ARGUENDO, THAT THE ISSUE IS PROPERLY BEFORE THIS COURT, AS PETITIONERS ARGUED IN THEIR PETITION FOR CERTIORARI AT 18-20, AND IN THEIR BRIEF AT 74-87, IS THE NOERR-PENNINGTON DOCTRINE APPLICABLE TO PETITIONERS?

III. CAN A STATE EVER USE ANY PROFESSIONAL OR OCCUPATIONAL LICENSING EXAMINATION, OR ANCILLARY PROCEDURE, FOR THE PRIMARY PURPOSE OF LIMITING THE NUMBER OF LICENSEES RATHER THAN TO DETERMINE THE INDIVIDUAL QUALIFICATIONS TO PRACTICE OF EACH APPLICANT?

IV. DID THE NINTH CIRCUIT ERR IN AFFIRMING THE DISMISSAL OF THE SPOUSES OF THE INDIVIDUAL DEFENDANTS?

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STATUTORY PROVISIONS AND RULES INVOLVED

(Additional to and amplifying those found in Petitioners' Brief on the Merits)

See Appendix ("App.") at 1-9,App.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is partially inaccurate, argumentative and fails to present pertinent details.

Respondent ("Ronwin") did not allege that "he did not receive a passing grade on the [1974] examination," Petitioners' Brief,14; c.f.,Complaint, ¶'s VII-IX, J.A. 10-12.

Petitioners fail to explain, as pled in the Complaint, ¶IV, J.A.9, and as admitted in Petitioners' Answer, ¶3, J.A.17, that Petitioners informed Ronwin and the other examinees that examinees who achieved the pre-set standard of a grade of 70 or more passed the examination and "..shall be recommended for admission to the Bar," 17A A.R.S., Rule 28(c)VIII, 6-7, App.

Petitioner Hoover informed Ronwin that Petitioners did not grade on a 0-100 scale;[1] rather, Petitioners used raw scores and after the results were known in raw score terms, a raw score was picked as equal to 70, "thereby the number of bar applicants who would

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[1] Nevertheless, the ultimate grades that Petitioners reported were in a form reflecting a 0-100 scale of grading.

receive a passing grade depended upon the exact raw score value chosen as equal to 70, rather than [on the] achievement by each Bar applicant of [the] pre-set standard [of 70]," Complaint, ¶VI, J.A.10.

That grading procedure was in conflict with the Arizona Supreme Court's expressed policy, 17 A, A.R.S., Rule 28(c)VIII,6-7, App., and gave rise to the anti-competitive effect challenged by Ronwin.

Ronwin also takes issue with footnote 3, Petitioners' Brief,15-16. Ronwin pled, Complaint, ¶VIII, J.A.11-12:

> When Plaintiff complained of the unlawful behavior of the Defendants, recited above, using the procedures provided by the rules of the Supreme Court of Arizona for said purpose, the Defendants without notice, hearing or medical examination, falsely and maliciously labelled the Plaintiff as 'mentally unable to engage in the active and continuous practice of law,' and, denied Plaintiff the right to take the July, 1974 Bar examination.

Proof: Defendant, George Read Carlock submitted an affidavit to the Arizona Supreme

Court (copy is Exh. C to Ronwin's Response to Appellees' [First]"Petition for Rehearing.." in 9th Circuit) in which Carlock averred that, inter alia, as Ronwin had charged "..that the Committee's action constituted a conspiracy in violation of Section 1 of the Sherman Act," he [Carlock] "..believed that the Committee could not appropriately find that [Ronwin] was mentally and physically able to engage in the active and continuous practice of law." see p.3, line 29 to p.4, line 11, Carlock's affidavit.

Ronwin also noted for the District Court, Ronwin's Response to Defendants' Motion to Dismiss,p.2, lines 2-12; and for the 9th Circuit, Ronwin's Opening Brief, p.12, that:

> Indeed it was only after [Ronwin] exercised his First Amendment right and criticized the manner of grading said examination that [Ronwin's] mental fitness [and physical fitness] was first questioned. Thus in his deposition in cause No. CIV 78-214 [District Court], CARLOCK admitted that he had no specific reason to raise the question about [Ronwin's] mental ability, but in attempting

> to cloth his charge, and that of the Committee he headed, with some credibility, CARLOCK asserted that it was [Ronwin's] attack on the manner of grading which he considered 'wrongheaded' and which gave rise to his, and said Committee's, initiation of the charge that [Ronwin] was not mentally able [and physically able] to practice law.

The vicious assault on Ronwin's mental ability (and even physical ability-later dropped) to practice law originated in lawlessness, and the same lawlessness, and fraud, characterized the hearing and result before the special committee, (which replaced the "regular" committee on which Petitioners served and which fact is not made clear in Petitioners' footnote, but is made clear in the Petition for Certiorari, fn. 3 at 4).

Although some elements are outside the immediate record, matters concerning Application of Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976), also referred to in Petitioners' footnote no. 3, are given in footnote here so that this Court can have a fuller understanding of what occurred in connection

with Ronwin's challenge to the 1974 grading process.[2]

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[2] Application of Ronwin rests on the statement, 555 P.2d at 317:

> In summary, there is significant expert testimony in the record to indicate that Ronwin has a "paranoid personality..."

The only expert to testify against Ronwin was a psychologist, Dr. Francis A. Enos. At the hearing on Ronwin's latest application for admission to the Arizona State Bar before the Arizona Supreme Court on December 16, 1982, Justice Francis A. Gordon, Jr., who wrote Application of Ronwin, carried on a discussion with Ronwin. Ronwin read two examples of Enos' perjury, which are in the record of said special committee, to Justice Gordon, who, on being asked, did not deny that Enos lied in his testimony. Neither did Justice Gordon deny that those examples and others of Enos' perjury had been brought to the attention of himself and the Arizona Supreme Court before Application of Ronwin was promulgated; and, that, as against Enos, that Court had the testimony of 3 psychiatrists who reported that Ronwin did not suffer from any mental illness and was not a paranoid personality. Two of those experts also informed the Arizona Supreme Court that the condition of "paranoid personality" was not a serious matter nor did it disable anyone from conducting normal professional work. Neither did Justice Gordon deny that some 12 Arizona attorneys testified that Ronwin was not mentally ill. The Dean of the Arizona State Univ. Coll. of Law testified to Ronwin's good mental health and legal ability as did another professor. When asked during the dialogue how he could justify the above-quoted statement from Application of Ronwin, Justice Gordon claimed it was "the record." Since Application of Ronwin appeared 4 more experts, making a total of 7 (6 psychiatrists and 1 psychologist) have told the Arizona Supreme Court that Ronwin is not

Petitioners exclaim, Petitioners' Brief 16:

> The law considered by the courts below showed that Arizona has a clearly articulated affirmative policy restricting competition in legal services.

The Ninth Circuit, which was a "court below",held the opposite view, Ronwin v. State Bar of Arizona, 686 F.2d 692, 698 (9 Cir. 1982).

In the Argument, §I.A., Ronwin challenges Petitioners' contention that they were empowered to "select a grading system," Petitioners' Brief, 16.

Petitioners' attempt to diminish the force and quality of the 9th Circuit opinion, Petitioners' Brief,17-18, overlooks the fact that a majority of the eligible judges of the Ninth Circuit saw no reason to rehear

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2-Cont'd.
mentally ill and is able to practice law. A total of 20 Arizona attorneys have done likewise. The Iowa Supreme Court, with the record of the Arizona Supreme Court before it in 1977, held Ronwin mentally able to practice law.

When the tactics against dissent common in the Soviet Union are adopted by Petitioners and the other Defendants, and by the Arizona Supreme Court, this Court should become very concerned.

the matter en banc, see Order, ¶2, J.A. 172-173.

SUMMARY OF ARGUMENT

Petitioners' version of the applicable rules is in error.

The state-action exemption applies, for both official and private bodies, when the sovereign units of the State (i) clearly articulate and affirmatively express a policy whose purpose and effect is anti-competitive, and (ii) when that policy is actively supervised by the sovereign, which is the Midcal test. At least the first prong of the Midcal test applies to Petitioners.

Ronwin does not complain of the anti-competitive effects which are incident to a bar examination whose purpose is to determine each examinee's aptitude to practice law according to a pre-set standard; Ronwin does complain of Petitioners' use of a grading process which converted instant bar examination to a mechanism for choosing the number

of examinees admitted to practice law without regard to their individual ability, which purpose was not clearly articulated nor affirmative expressed by the sovereign concerned. Petitioners fail both the Midcal test and their own suggested test.

The Feldman case does not apply herein and, in any event, ought to be overruled.

Scaled scoring is a myth which enables bar examiners to manipulate the numbers of admitted examinees. The active supervision prong is an essential ingredient of and inseparable from the first prong of the Midcal test.

No immunity, "official" or judicial, covers Petitioners. Petitioners are not protected by the Noerr-Pennington doctrine.

Any bar examination whose purpose and/or grading is aimed at other than measuring examinees' own ability to practice law is violative of the 5th and 14th Amendments.

ARGUMENT

I. THE GRADING PROCEDURE EMPLOYED BY PETITIONERS FOR THE FEBRUARY, 1974 ARIZONA STATE BAR EXAMINATION WAS NOT CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED BY THE ARIZONA SUPREME COURT ACTING AS SOVEREIGN; AND, IN ANY CASE, THE SOVEREIGN DID NOT ACTIVELY SUPERVISE THE GRADING.

A. Clarification of Confusion Over Which Arizona Supreme Court Rules Applied At Times Relevant Hereto.

Petitioners' version of Rules 28(c)VII A and B, and 28(c)VIII A, which they claim were in force during the examination in contention, are given at 7-9, App., see also Petitioners' Brief, 9-10, 68,fn.16. Ronwin believes that the correct version of the rules is that given at 5-7, App. The order allegedly promulgating Petitioners' version of the rules was dated January 11, 1974 and ordered that the rules therein be effective January 15, 1974. A copy of the

certified order is attached to Petitioners' (First) "Petition for Rehearing..." filed in the Ninth Circuit phase of the case. That, however, was contrary to Arizona law.

A.R.S., §12-109, at 3-4, App., provides that any rules of court promulgated by the Arizona Supreme Court shall be printed and distributed to all members of the state bar and to other persons who apply (sub-section B, §12-109, at 4, App.,)and that, "[t]he rules shall not become effective until sixty days after distribution," §12-109(C) at 4, App.(emphasis added). Hence, the order of January 11, 1974 promulgating Petitioners' version of the rules could take effect, assuming arguendo that the required distribution took place, A.R.S.,§12-109(B), no earlier than March 12, 1974, which was eleven (11) days after the February, 1974 examination had ended.

A copy of an order of the Arizona Supreme Court, dated June 18, 1955, is shown at 9-

11, App. Said order appears on p.2 of the hard-bound volume of 17A, A.R.S., and on p. 464 of a soft-bound "pamphlet" labelled, "Arizona Rules of Court," which accompanies the Arizona Revised Statutes and contains all rule amendments to August 15, 1982. The rules in the "pamphlet" are identical to the texts found in Vol. 17A as modified by the 1982-1983 pocket part. Said order marks the rules which follow it in Vol. 17A and in the pamphlet as the official publication of the Arizona Supreme Court rules. The replication of said order in the latest pamphlet shows that the June 18, 1955 order retains its vitality to the present; and, ¶3 of said order shows cognizance of, and obedience to, the terms of A.R.S.,§12-109(C), at 4, App.

In Arizona, §12-109 is, pursuant to A.R.S., §12-111 (at 4, App.), a "rule of court" which can be modified or suspended "by rule promul-

gated by the [Arizona] Supreme Court,"at 4, App. However, there has never been a modification or suspension of the terms of §12-109 such as occurred, in part, with A.R.S., §12-409, concerning recusal of State judges, when the Arizona Supreme Court adopted Rule 42(f), Ariz. R. Civ. Proc., Vol. 16, A.R.S., pp. 325-330; see Del Castillo v. Wells, 22 Ariz. App. 21, 523 P.2d 92, 95 (1974). Indeed, the continuing vitality of the order of June 18, 1955, and the continued presence of §12-109 in the A.R.S., shows that the Arizona Supreme Court has continued to respect the terms of §12-109 from its inception to the present.

In 1960, the Arizona Constitution was amended and the Arizona Supreme Court was given the exclusive power to make rules relative to procedural matters in any [State] court, Ariz. Const., Art. 6, §5,(added 1960); nevertheless, as held by the Arizona Supreme Court itself, "'statutory rules [such as

§12-109] remain in effect until modified or suspended by the rules promulgated by the [Arizona] supreme court,'" State v. Blazek, 105 Ariz. 216, 462 P.2d 84, 85 (1969).

Clearly, Ronwin's version of the rules, at 5-7, App., apply to this case. Petitioners' version of Rule 28(c)VIII requires a "passing grade," 8-9, App.; whereas, Ronwin's version designates 70 or more as the passing grade, 6-7, App. Even under their version, Petitioners are bound by the preset passing grade of 70, since they admit, Answer, ¶3, J.A.17, Ronwin's allegation that they announced 70 to be the passing grade, Complaint, ¶IV, J.A. 9. However, as the other variances between the two versions may have some effect on what the Arizona Supreme Court "clearly articulated and affirmatively expressed," and to dispell the incipient confusion, this detour on the rules was appropriate.

B. When Does the State-Action Exemption From Antitrust Law Apply?

From Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L.Ed. 315 (1943) to Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982), this Court has developed a test to determine when a state action restraining trade or commerce is exempt from antitrust sanctions. In Goldfarb v. Virginia State Bar, 421 U.S. 773, 791, 95 S.Ct. 2004, 2015, 44 L.Ed.2d 572 (1975), this Court said:

> It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

In an action where the State, in the form of the Arizona Supreme Court, was "the real party in interest," Bates v. State Bar of Arizona, 433 U.S. 350, 361, 97 S.Ct. 2691, 2697, 53 L.Ed.2d 810 (1977), reh. den. 434 U.S. 881, 98 S.Ct. 242, this Court,

at first, reiterated the Goldfarb theme, 433 U.S. at 360, 97 S.Ct. at 2697:

> That court is the ultimate body wielding the State's power over the practice of law, * * * thus the restraint is 'compelled by direction of the State acting as sovereign,' (citing Goldfarb).

But then, this Court expanded the element of sovereign compulsion by adding the need for clarity of sovereign command and the need for active State supervision, 433 U.S. at 362, 97 S.Ct. at 2698:

> [W]e deem it significant that the state policy is so clearly and affirmatively expressed [by the command of the Arizona Supreme Court under its Rules 27(a) and 29(a), and its Disciplinary Rule 2-101(B), 433 U.S. at 360, 97 S.Ct. at 2697] and that the State's supervision is so active. (bracketted phrase and emphasis added).

A year later, a plurality of this Court in City of Lafayette,La. v. La. Power & Light Co., 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) slightly enlarged the test to one which requires that a State policy which engenders an anticompetitive restraint be:

> clearly articulated and affirmatively expressed as state policy (emphasis added),

and that the State's policy be actively supervised by the sovereign.

Subsequently, this Court noted that the "clearly articulated and affirmatively expressed" standard has been adopted by a majority of the Court, City of Boulder, 455 U.S. at 51, 102 S.Ct. at 840, citing New Motor Vehicle Board of Calif. v. Orrin W. Fox, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978) and California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). That standard also includes the requirement of active State supervision, Midcal, 455 U.S. at 105, 100 S.Ct. at 943.

Petitioners have been referring to that test as the Midcal test; Ronwin will follow suit.

"Clear" and "clearly" suggest without doubt, obsurity, ambiguity or confusion,

Random House Dictionary of the English Language, unabridged ed., N.Y. (1967), pp. 274-275.

It is well that this Court has come to require clear articulation of sovereign compulsion of any State policy which would nullify the reach of federal antitrust law, since, United States v. Topco Associates, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972):

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms...

and, through the Sherman Act, City of Lafayette, 435 U.S. at 398, 98 S.Ct. at 1129:

> ...Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country.

This Court may take judicial notice that in the great ideological conflict with the

"Eastern Bloc," this nation prides itself on its commitment to free enterprise.

Quoting Parker, this Court in City of Boulder, 455 U.S. at 53, 102 S.Ct. at 842, observed that ours is a dual system of government.

That is true; but its parts, federal and state, are not equal. It is not even describable as a system of primus inter parus. It is a system of supremacy of the federal government over any, and all, state governments, U.S. Const., Art. VI, Cl. 2. The authority of Congress to promulgate the antitrust laws flows from the Commerce Clause, U.S. Const., Art. I, §8, Cl.3, which is the powerful tool whereby Congress since the early Thirties has worked a revolution in our social, political and economic fabric.

Before the States are allowed to override the "Magna Carta of free enterprise;" to override an essential linchpin in Amer-

ican ideological commitment; and to override the supremacy of Congressional acts, the States ought surely be required to do so only by a clear articulation and affirmative expression of the anticompetitive policies they seek to promote thereby and the States ought to be required to strictly supervise any such clearly articulated and affirmatively expressed policies regardless of whom, public or private, the States appoint as enforcers thereof. Perhaps a third element ought to be added to the Midcal test requiring the States to describe and to justify the compelling, or at least rationally related, interest in curtailing the competitive, economic behavior of those within the State.

C. What Test Applies to Petitioners?

Petitioners claim that the Midcal test does not apply to them, Petitioners' Brief 33; rather, as "state officials" they claim that, Petitioners' Brief, 33-34:

> ...this Court has consistently held that when governmental conduct is at issue, the test for state action immunity is whether the State has clearly articulated an affirmative policy designed to supplant competition with regulation, and whether the policy contemplated the challenged action. New Motor Vehicle Board v. Orrin W. Fox, supra; City of Lafayette, supra.

The claim of two different tests is repeated a number of times in Petitioners' Brief, e.g. at 37, 39-40, 41-42, 43.

Preliminarily, Petitioners fail, in the quotation above, to point to what part of the decisions in either Orrin W. Fox or City of Lafayette support their view. But, in any case, they misstate the facts since, as quoted above, 16-17, from City of Lafayette, 435 U.S. at 410, 98 S.Ct. at 1135, this Court states what became the Midcal test therein; and, in Orrin W. Fox, the first part of the Midcal test is given, 439 U.S. at 109, 99 S.Ct. at 412 and in the next paragraph, the Court shows its concern for the second part of the Midcal

test by stating: "The duration of interim restraint is subject to ongoing regulatory supervision," 439 U.S. at 110, 99 S.Ct. at 412 (emphasis added).

Petitioners' claim that one test is applicable to private parties and another to public parties finds no support. In fact, not only do the authorities that Petitioners quote hold to the contrary (see preceding paragraph, supra), but in Bates, where the State was attacked, the standard that became Midcal was declared, as quoted hereinabove at 15-16.

From time to time this Court, or individual Justices, have made comments that would appear to imply a distinction between an antitrust charge against public officials rather than against private parties; see Justice Stevens' concurring opinion in City of Boulder, 455 U.S. at 59, fn. 2, 102 S. Ct. at 844, fn. 2; however, one cannot discern proof of Petitioners' claim that this

Court has declared different tests for each category of defendant.

Both tests described by Petitioners have the identical first prong; i.e., the "clearly articulated and affirmatively expressed" requirement, Petitioners' Brief, 33-34; and, it is submitted that it may become academic as to whether or not the second prong of the Midcal test applies to Petitioners, as Ronwin believes, or the "contemplated activity" prong applies as Petitioners claim; since, as this brief unfolds, it will be obvious that as to Petitioners, the "clearly articulated and affirmatively expressed" part of the Midcal test or of Petitioners' suggested test has not been satisfied.

D. Just What Is Ronwin's Complaint?

Petitioners argue that, Petitioners' Brief, 57:

> [Petitioners] acted as state officials under a clearly articulated state pol-

> icy to supplant competition in legal services with regulation. See also Petitioners' Brief, 61-62.

At all times relevant hereto, and whether under the version of the rules contended for by Ronwin ("Ronwin's version"), or the version advocated by Petitioners, ("Petitioners' version"), Argument, §I.A., supra, there did not exist a "clearly articulated state policy [of Arizona] to supplant competition in legal services with regulation."

Under either version of the rules, the only possible rules of the Arizona Supreme Court from whence the alleged "clearly articulated state policy" may be discerned are Rules 28(a); 28(c)VII and 28(c)VIII.

Rule 28(a) is identical in either version, 5-6, 7, App. Said rule ordered Petitioners to examine applicants (for their own ability to practice law-implied) and to recommend to the Arizona Supreme Court for bar admission applicants who were found

by Petitioners to have the necessary qualifications. There is no command in Rule 28(a) to "supplant competition with regulation."

Ronwin's version of Rule 28(c)VIII, 6-7, App., ordered Petitioners to recommend for bar admission all applicants "who receive a grade of seventy or more," and Rule 28 (c)VII, 6,App., merely lists the subjects upon which applicants would be tested.

Under Ronwin's version, the only clearly articulated policy of the Arizona Supreme Court is that Petitioners were to determine by examination the ability of each, individual applicant by grading the examinations on a 0-100 scale and declaring all those who achieved a total grade of "seventy or more" to have passed the examination. That is not a clearly articulated policy to "supplant competition in legal services with regulation." It is a policy directed fundamentally at determining the qualified from

the unqualified and not directed, per se, at limiting the numbers of admitted applicants. In essence, it is a regulatory policy which may have incidental anticompetitive effects; i.e., those applicants not attaining a grade of "seventy or more" cannot be admitted to the bar and hence cannot compete for legal work. Yet, under the policy, it is quite possible to have no anticompetitive effects; e.g., every applicant achieves a grade of "seventy or more."[3]

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[3]In Wyoming, the pass percentage on the Winter examinations in 1974 and 1975 was 100 each time; in South Dakota, the 100 percent passing rate was achieved in the 1974 examination. See National Bar Examination Digest, 1977 Ed., Harcourt Brace Jovanovich, Wash. D.C., pp. 42,48. In North Dakota, the 100 percent pass rate was observed in the summer examination in 1978 and in the winter examination of 1979 (a 99% pass rate was obtained in the summer of 1979). In West Virginia, the 100 percent pass rates were observed for both examinations given in 1977 and on the winter examination in 1978. See BAR/BRI Digest, 1981 Ed., Harcourt Brace Jovanovich, Wash. D.C, pp. 29, 38. It may be noted that for many of the examinations whose results are reported in said digests, passing rates of 90% or more are not uncommon, which shows that relatively small anticompetitive effects are involved. All of the States

The anticompetitive effects that would have been incidental to the pass-fail experience if Petitioners had obeyed the sovereign's command,(under Ronwin's version) are not being complained of by Ronwin.

However, instead of grading on a 0-100 scale without gimmicks, Petitioners employed a raw score system. After the raw scores were obtained, Petitioners picked a raw score as equal to seventy. Thus, the number of applicants passing the examination and thereby recommended for admission to the bar, depended upon which raw score was taken as seventy. Furthermore, since the raw score taken as equal to seventy was the result of an averaging process of all the raw scores, said raw score,and consequently the "seventy" to which it was equated, was

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3 Cont'd.
mentioned above employed the Multi-State and essay examination combination as did Arizona on the examination in contention herein.

thereby divorced from the individual achievement of an actual, pre-set grade of seventy based on a true 0-100 scale, Complaint, ¶VI, J.A. 10.[4]

In effect, Petitioners were no longer determining each applicant's own ability to practice law based on a pre-set standard, but were using the examination as a means to recommend for admission (in practice virtually equivalent to admission) the particular number of examinees that suited Petitioners' personal notion of how many new lawyers the profession in Arizona could

[4]It is appropriate to recall that "[f]or purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted...And, the complaint is to be liberally construed in favor of plaintiff," Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct. 1843, 1849, 23 L.Ed.2d 404 (1969), reh. den. 396 U.S. 869, 90 S.Ct. 35, 24 L.Ed.2d 123. Furthermore, "..a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which could entitle him to relief," Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

absorb at that time, Complaint, ¶VII, J.A. 10-11.[4]

It is this latter anticompetitive effect produced by the violation of the articulated policy of Arizona to determine the qualifications of each applicant, individually, which has drawn Ronwin's fire.

Nor does Petitioners' version of the rules lend them comfort. Rule 28(a) is identical in both versions, hence, as discussed above at 24-25, the rule is not a command to "supplant competition with regulation."

None of the discretionary allowances in Petitioners' version of Rules 28(c) VII and VIII, 7-9, App., convert the primary thrust of the rules involved, including the provisions of Rule 28(a) from the objective of using the examination to determine the qualifications of individual bar applicants to a "clearly articulated and affirmatively expressed" command to Petitioners to employ the examination for the primary purpose of

limiting the numbers of admitted bar applicants to the number Petitioners think proper. That is particularly true, since, Petitioners admit, Answer, ¶3, J.A. 17, Ronwin's allegation that Petitioners fixed the "passing grade" at the pre-set standard of 70, Complaint, ¶IV, J.A. 9, which puts Petitioners in the same situation as they are under Ronwin's version of the rules.

In any event, no interpretative permutations or combinations of the rules, under either version, provides Petitioners with any evidence of an order to which they can point wherein the Arizona Supreme Court, as sovereign in the relevant area of governmental activity, Bates, 433 U.S. at 359-360, 97 S.Ct. at 2697, "clearly articulated and affirmatively expressed" its command that the bar examination was to be used for the primary purpose of limiting the numbers of admitted applicants rather than as a tool to determine the individual qualifications

of each applicant by a pre-set standard. That is precisely the major point upon which the Ninth Circuit based its decision, Ronwin, 686 F.2d at 698.

Moreover, as Ronwin has noted, Ronwin's Opening Brief in the 9th Circuit,at 15:

> ...the Arizona Supreme Court would most likely not promulgate a directive to [Petitioners] requiring or compelling the use of the Bar examination to control the numbers admitted for anti-competitive purposes, since, on the two occasions when the percent admitted applicants fell into the fifty percentile area [1974 and 1976, 11,App.], the Deans of both law schools in Arizona led the public outcry against [Petitioners'] grading results.

Instant case reflects Petitioners' efforts to achieve via the backdoor what would be most impolitic if clearly articulated and affirmatively expressed; i.e., an avowed policy to use the bar examination for deliberate anti-competitive purposes; which outrages the American concept of equal opportunity in a competitive economy, and is as pernicious and lacking in any redeeming virtue

as horizontal price-fixing and therefore is a per se violation of, and preempted by, federal antitrust law, Rice v. Norman Williams Company, ___U.S.___, 102 S.Ct. 3294, 3299 (1982), fn. 5.

Petitioners neither come within the Midcal test, as held by the Ninth Circuit, Ronwin, 686 F.2d at 698; nor, the test which Petitioners champion, Petitioners' Brief, 33-35.

E. Does Petitioners' Status Provide Immunity to Petitioners?

Petitioners describe themselves as "state officials," Petitioners' Brief, 28.

The thread runs through Petitioners' argument that as "state officials" the "gauzy cloak of state involvement," referred to in Midcal, 445 U.S. at 106, 100 S. Ct. at 943, would not apply to them, Petitioners' Brief, 46-48, since:

> ..a state agency or official acting pursuant to a clearly articulated state policy is restrained from anti-competitive misconduct by the existence of the state policy and authorization for the official to act, Petitioners' Brief, 49.

However, as shown herein, Argument,§I.D., Petitioners, as "state officials", did not act pursuant to a clearly articulated state policy and, without restraint or authorization from the sovereign (the Arizona Supreme Court), freely engaged in anticompetitive misconduct, Ronwin, supra, 686 F.2d 696, 698.

Petitioners' unauthorized use of the grading process to control the numbers of admitted bar applicants was an unlawful extension and exploitation of Petitioners' mandate and represented a "private anticompetitive activity" which is no more protected than the fee-fixing activities of the cooperative action of the Fairfax County and Virginia State Bar Associations,

Goldfarb, 421 U.S. at 790-791, 95 S.Ct. at 2015; City of Lafayette, 435 U.S. at 417, 98 S.Ct. at 1138-1139.

For the preceding reasons, Petitioners' alleged status as "state officials" provides no shield for their liability herein; nor would their alleged status, per se, afford any protection, City of Boulder, 455 U.S. at 50, 102 S.Ct. at 842.

Petitioners' alleged defense as "state officials" is a variant of their overall claim of state action exemption, Petitioners' Brief, 25-62, and not an alleged defense of judicial or quasi-judicial immunity.

In the District Court, Petitioners raised the doctrine of judicial immunity as an affirmative defense, Answer, ¶9, J.A.18, stating, without more, that: "This action is barred by the doctrine of judicial immunity." That was Petitioners' last reference to any alleged defense based on judicial immunity

in the courts below. Nor have Petitioners attempted to erect a judicial immunity defense herein;and, Petitioners have confined themselves to the state-action issue, see footnotes 1 and 4, Petition for Certiorari, at i, 4. Petitioners have surely waived any defense said doctrine might have given them. Nevertheless, The State Bar of California ("SBC") has argued an alleged "official conduct" immunity which reduces to quasi-judicial immunity, SBC Brief at 20-25.

Ronwin believes that SBC lacks standing to erect the defense of judicial or "official" immunity for Petitioners and that, as amicus, SBC is confined to presenting its partisan view of such issues as are raised herein by the litigants; however, to avoid the peril of ignoring what may be a properly raised issue, a response, arguendo, is proffered hereby.

As above, Petitioners have certainly failed to press any alleged defense of ju-

dicial immunity and thereby have waived it.

Petitioners are not "judges"; at best, they might qualify as "quasi-judicial" officers with quasi-judicial immunity, Butz v. Economou, 438 U.S. 478, 512, 98 S.Ct. 2894, 2913, 57 L.Ed.2d 895 (1978); but, Petitioners would have both the burden to claim the immunity, Dennis v. Sparks, 449 U.S. 24, 29, 101 S.Ct. 183, 187, 66 L.Ed.2d 185 (1980), which Petitioners have waived, supra, and (if not waived), to demonstrate their entitlement to the immunity, id, 449 U.S. at 29, 101 S.Ct. at 187, which Petitioners have not attempted to do, supra at 34-35.

By their own assertions, Petitioners do not decide who is admitted to practice law, Petitioners' Brief at 80; that duty lies exclusively with the Arizona Supreme Court, 17A A.R.S., Rule 28(a), at 5-6, App.

While Petitioners recommend admission or denial, that function as to the passage

or failure of the bar examination is largely without discretion and predetermined since the applicable rules call for recommendation of examinees attaining a passing grade of 70 (Ronwin's version, Rule 28(c)VIII, at 6-7, App.) or a "passing grade" (Petitioners' version,Rule 28(c) VIII, at 8-9, App.) which "passing grade" Petitioners admit was chosen at 70 for instant examination, c.f. Complaint, ¶IV, J.A.9 with Answer, ¶3, J.A.17. Thus, Petitioners' activity with respect to the antitrust question herein, was not judicial but administrative and ministerial such as collection of examination data, proctoring and arranging for the examination, grading. While such acts may have some discretionary content, they never rise to a judgment status, c.f., District of Columbia Court of Appeals v. Feldman, ___U.S.___, 103 S.Ct. 1303, 1312 (1983). Therefore, "..the func-

tional comparability of [Petitioners'] judgments to those of the judge..," Butz, 438 U.S. at 512, 98 S.Ct. at 2913, is absent, and in that absence, "quasi-judicial" immunity is unavailable to Petitioners; see also Doe v. County of Lake, Indiana, 399 F. Supp. 553, 556 (N.D.Ind. 1975).

Assuming, arguendo, that Petitioners are draped with quasi-judicial immunity, can the defense hold under the circumstances of this case? It is obvious from the preceding quotation from Butz that what holds for judicial immunity is equally applicable to quasi-judicial immunity.

"[J]udicial immunity is not absolute and unlimited," Doe, id., 399 F.Supp. at 556. Judicial immunity from an action for damages is lost when the party acts in clear absence of jurisdiction or pursues nonjudicial activities, Thompson v. Montemuro, 383 F.Supp. 1200, 1206 (E.D.Pa. 1974).

Furthermore, "..when a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost," Rankin v. Howard, 663 F.2d 844, 849 (9 Cir. 1980), cert den. sub. nom. Zeller v. Rankin,451 U.S. 939, 101 S.Ct. 2020, 68 L.Ed.2d 326, and Rankin adds, 633 F.2d at 849: "..If his acts were part of a conspiracy, he is properly held responsible for the consequences."

In this case, Petitioners,(arguendo)qua judges, had their "jurisdiction" clearly set forth in the rules. Under Ronwin's version, at 5-7, App., or under Petitioners' version, at 7-9, App., under which Petitioners have admitted declaring a pre-set standard of 70, see 29-30, supra, the Arizona Supreme Court gave Petitioners the "jurisdiction" to determine the ability to practice law of each individual applicant. Such anti-competitive behavior as would accompany

the exercise of that "jurisdiction" was incidental to the purpose of the "jurisdiction." However, when Petitioners converted the purpose of the examination by use of the grading system to a mechanism for artificially determining the numbers of admitted applicants, see 27-29, supra, Petitioners knew, or should have known, that: (i) they were acting without "jurisdiction" and (ii) were acting in violation of 15 U.S.C.§1. Thereby, Petitioners lost their immunity--if they ever had any.

Petitioners proclaim their "official" status, Petitioners' Brief at 28. In truth, they serve parttime, unremunerated and without the welfare benefits common to regular Arizona state officials. Petitioners' true occupation is the fulltime, private practice of law with monetary profit as a major stimulus. As a consequence, Petitioners have a private, personal, pecuniary interest in

depressing the numbers of attorneys admitted annually to practice. Had Petitioners followed the clearly articulated and affirmatively expressed rule of the Arizona Supreme Court to use the examination to determine the individual capacities of applicants to practice law according to the preset standard, Petitioners' private, personal, pecuniary interest would have been separable from their duties; but, when Petitioners decided sua sponte to use an examination grading procedure to artificially control the numbers of admitted applicants, Petitioners' private, personal, pecuniary interest became, ab initio, inseparable from their illegal activities.[5]

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[5]In February, 1974, the variation from the average admittance rate resulted in approximately 37-42 less admitted attorneys, see Ronwin's Response to Motion to Dismiss (in District Court), p. 5, and Ronwin's Opening Brief in the Ninth Circuit, pp. 17-18. The absence of 37-42 admitted attorneys was an actual or potential economic plus for each Petitioner and/or his firm.

In essence, Petitioners do attempt to draw the "gauzy cloak of state involvement," Midcal, 445 U.S. at 106, 100 S.Ct. at 943, over their activities and by their conduct brought themselves squarely within the Midcal test, which they fail.

To allow Petitioners to escape liability for damages would,in the circumstances, continue an economic reward for their illegal behavior which is unquestionably against public policy, Board of Trustees of Community College..v. Cook County College Teachers Union, 74 Ill.2d 412, 425-426, 386 N.E.2d 47, 53 (1979); Sedco Intern.S.A. v. Cory, 522 F.Supp. 254, 320 (S.D.Iowa 1981); and, does nothing to foster the purpose of judicial immunity which is to allow fearless decision making undeterred by the prospect of damage liability, Dennis,supra, 449 U.S. at 31, 101 S.Ct. at 188, Rankin v. Howard, 633 F.2d 844, 847 (9 Cir. 1980).

And, where the initiative and independence of the judiciary is not effectively impaired, the doctrine of judicial immunity does not hold, Shore v. Howard,414 F.Supp. 379, 385 (N.D. Tex. 1976).

Beyond doubt, Petitioners are not entitled to the protection of quasi-judicial or "official" immunity.

F. Is the Feldman Case Applicable?

Petitioners' single, brief citation to the case of District of Columbia Court of Appeals v. Feldman, ___U.S.___, 103 S.Ct. 1303 (1983) is in a state-action immunity context, Petitioners' Brief at 42, rather than reference to Feldman's main thrust. SBC makes mention, too, but without force, SBC Brief at 6,7,23. On the other hand, Petitioners' amicus, The National Conference of Bar Examiners, ("NCBE") devotes a section of its Brief (at 12-14) to argue the alleged application of Feldman to this case.

The Feldman decision rests in major part on the terms of 28 U.S.C.§ 1257, which requires that "final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by [this Court]..." (emphasis added), which NCBE recognized, NCBE's Brief at 12. However, the predicate which NCBE implies to be present; i.e., that a final judgment of the Arizona Supreme Court is being attacked, is absent. No judgment of the Arizona Supreme Court is under review in this action, see Complaint, J.A. 6-13.

What is attacked is a grading process which (i) was not clearly articulated and affirmatively expressed by the sovereign, and (ii) the conversion of a bar examination from a means to determine individual aptitude to practice law to a tool to artificially regulate the numbers of attorneys annually admitted to practice law.

Hence, Feldman's restriction on U.S. District Court jurisdiction is not applicable herein.

It has long been held that exclusive jurisdiction to hear federal antitrust claims lies in the U.S. District Courts, Feldman v. Gardner, 661 F.2d 1295, 1303 (D.C. Cir. 1981) and fn. 60; therefore, this action was properly commenced in the U.S. District Court[6]; and, if Petitioners' actions were not clearly articulated or affirmatively expressed by the sovereign, the Arizona Supreme Court, then the action may continue in the U.S. District Court which is the entire thrust of Goldfarb and is implicit in Bates.

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[6]The predicates requiring the raising of federal questions in the Arizona Supreme Court are absent in this case, Feldman, 103 S.Ct. at 1315, fn. 16, since Ronwin is not attacking a final judgment of the Arizona Supreme Court, 44-45 supra, and as said Court is without jurisdiction to entertain a federal antitrust claim. In any event, Petitioners allege that Ronwin did raise antitrust violation in the State court, Petitioners' Brief at 15.

Since Petitioners and their amici have turned to Feldman, the quality of the decision deserves examination. Feldman approves a dichotomy whose first appellate announcement with any clarity is found in Doe v. Pringle, 550 F.2d 596 (10 Cir. 1976), cert. den. 431 U.S. 916, 97 S.Ct. 2179, 53 L.Ed.2d 227. The dichotomy ordains that constitutional challenges to a State's general rules governing bar admissions are cognizable in the U.S. District Courts, whereas, a claim based on constitutional grounds that the State has unlawfully denied a particular application for admission is reviewable, if at all, only in this Court, id., 103 S.Ct. at 1316.

The confinement of particular, individual claims to hearing in this Court on certiorari is allegedly dictated by the terms of 28 U.S.C. §1257, id., 103 S.Ct. at 1317. Although not identified in Feldman, the basis for the constitutional claims, whe-

ther general or particular challenges, usually stems from 28 U.S.C. §1983 and kindred statutes, and/or from 28 U.S.C. §1331. §1331 is its "own" jurisdictional statute; whereas, jurisdiction for §1983 is given in 28 U.S.C. §1343.

Both §§1331 and 1343 lodge jurisdiction of constitutional questions in the U.S. District Courts and, without doubt, are intended to permit enforcement of the fundamental rights of citizens as embodied in the Bill of Rights and such subsequent Amendments as the 14th. As shown by the approving quotation from MacKay v. Nesbitt, 412 F.2d 846 (9 Cir. 1969) on the "rule" of §1257, Feldman, continuation of fn. 16, 103 S.Ct. at 1316, the purpose of §1257 is respect for the principle of comity.

While not explicitly indicated, but referred to in Justice Stevens' dissent, Feldman, 103 S.Ct. at 1318-1319, the question as to particular, constitutional chal-

lenges facing this Court in Feldman was: which jurisdictional statute takes precedence; i.e., §1257 over §§ 1343 and 1331 or vice versa? The Feldman decision places §1257 above the latter two and thereby elevates the interests serving comity over those serving and intended to uphold and defend fundamental, constitutional rights. That must be error. Suffice it as partial proof that the members of this Court are specifically sworn to uphold and defend the Constitution, not comity.

Additionally, the absoluteness of the requirement that final judgments of a State's highest court can be reviewed "only in this Court. See 28 U.S.C. §1257," Feldman, 103 S.Ct. at 1311 (see also 1315) is absent from the statute whose language uses the permissive, "may," and not the peremptory, "shall," supra at 44. Thereby, Congress declared no absolute barrier to the jurisdiction of U.S. District Courts to hear

all constitutional challenges to bar admissions or other bar matters; and, as Congress specifically gave U.S. District Courts such jurisdiction in §1343, as in §1331, in unambiguous language, this Court lacked a legal basis for nullifying said jurisdiction as to particular, constitutional challenges arising after final judgments in bar matters.

§1257 also refers to "review" of final judgments within its compass. However, the constitutional questions which are raised in bar matters are usually not the essence of the resulting final judgments and, even where brought to the State court's attention, no facility for trial accompanied by proper due process, either exists or is extended to hear the civil rights complaints. As Justice Stevens notes, it is not a "review" of a final judgment which the U.S. District Courts would undertake under §§ 1331, 1343, Feldman, 103 S.Ct. at

1318; rather, the U.S. District Courts would be trying, de novo, civil rights actions on the question of the constitutionality of the procedures used by the State court or by a committee or agent appointed by the State court just as in the currently permitted jurisdiction of U.S. District Courts under Feldman for general, constitutional challenges to State rules and regulations in bar matters. The question of the bar admission or the disciplinary issue, per se, would not be "reviewed."

As to lawyers and bar applicants in conflict with bar and judicial authorities, the practical result of Feldman has been to approve past practice in various Circuits and now, nationally, future denials of the most fundamental, constitutional rights of members of those groups. Whereas an applicant for a medical, dental, contracting or other professional or occupational

license can come as of right to the U.S. District Courts with their particular, constitutional challenges, see dissent in Feldman, 103 S.Ct. at 1319, fn. 2, lawyers and bar applicants are confined to seek certiorari in this Court which is a matter of grace and is usually denied. Members of other professions and occupations can move to jury trial of their constitutionally based grievances but lawyers and bar applicants can be denied hearing with regularity and with foreclosure of any practical, efficacious route to enforcement of their civil rights.[7]

Feldman unconstitutionally relegates lawyers and bar applicants to second class

[7] Ronwin's last nine (9) applications for admission to the State Bar of Arizona have been denied without hearing and without elemental due process accorded. Ronwin's demands for hearing with due process safeguards have been rejected out of hand. Ronwin's efforts to obtain certiorari in this Court have met with similar denial. How does Ronwin enforce his civil rights or are Ronwin's civil rights less than those of other citizens?

citizenship contrary to this Court's specific holding in Spevack v. Klein, 385 U. S. 511, 516, 87 S.Ct. 625, 629, 17 L.Ed.2d 574 (1967).

G. Commentary on Selected Items in the Briefs of Petitioners and Their Amici.

Petitioners or their amici make various statements which are either incorrect or tend to mislead. For example, the conflict alleged in Petitioners' Brief at 69, between the Ninth Circuit opinion in Benson v. Arizona State Board of Dental Examiners, 673 F.2d 272 (9 Cir. 1982) and in Ronwin does not exist, Ronwin, 686 F.2d 696, fn.4. Space considerations prohibit other illustrations; however, the questions of scaled scoring and of active supervision require treatment.

1. On Scaled Scoring

Petitioners do not discuss the grading process they used; however SBC describes

scaled scoring and paints it as beneficial, SBC Brief at 7-8. NCBE also mentions the system, NCBE's Brief at 23 and fn. 8.

NCBE's claim that the Arizona Supreme Court did not specify "a particular method of grading..," NCBE Brief at 23, is erroneous in its reliance on Petitioners' version of Rule 28(c)VIII, see Argument, §I.A, supra; and is specious in arguing that Ronwin's version of said rule, "merely said 70 would be a passing grade, specifying neither the 0-100 grading Ronwin claims, nor the method for determining what grade to give an examination," NCBE Brief at 23.

It is universally accepted that a grade of 60, 70, 80, etc., on a school or other examination is invariably based on a 0-100 scale. NCBE forgets to acknowledge that the final bar examination results on the individual essay questions were reported on an obvious 0-100 scale.[1]

The gist of SBC's and NCBE's description of "scaled scoring" is that the procedure is employed only as a means allegedly to "equalize" the difficulty of bar examinations from year to year. By their own admission, only a "limited number of repeat or control questions" are used for comparisons, SBC Brief at 7. Thus, most questions are de novo and not "equated." Since the answering and grading of essay questions is a highly subjective process, the scheme to "equalize" an entire examination by comparing results on a few repeat questions borders on nonsense. If "scaled scoring" was such an unqualified success at "equalization", then the percent passing for instant examination (Winter, 1974) should have been approximately 75% rather than 54%, and 75% rather than 58% for the Summer, 1976 examination, see App. at 11. The drop in percent passing for instant examination was equivalent to a reduction of approxi-

mately 29 percent in the number of admitted attorneys (compared to the four year average, 1973 to 1976), which translated to between 37 and 42 attorneys, see Ronwin's Response to Motion to Dismiss (in District Court), p. 5 and [Ronwin's] Opening Brief in the Ninth Circuit, pp. 17-18. These figures indicate that rather than equalize examination difficulty, the unauthorized method of grading was employed to reduce the numbers of admitted examinees.

By the amicus admission, scaled scoring involves pooling the results of the group of examinees and determining their relative performance, SBC Brief at 7, which, ipso facto, precludes grading their examinations so as to determine which examinees met the pre-set standard of 70, (whether in Ronwin's version of the rules or in Petitioners' version, since Petitioners adopted 70 as the pre-set standard, supra at 14,29-30). Furthermore, the very act

of choosing a raw score as equal to 70 is automatically and inseparably hinged to a determination of the number of admitted examinees.

The reason why SBC is so stirred herein is reflected in the pass percentage results from California when compared to States which, like California, use the one-day, multiple choice Multistate examination plus an essay examination; see results comparison at 12, App.

Can one seriously believe that the law in California is so much more difficult than in Utah, Texas and New Mexico (the latter two are community property States as is California) to justify an average pass percentage on the California bar examinations from 1973 to 1979, inclusive, of only 50.21% while Texas reports 87.76% passing and New Mexico experiences 71.71% for the same period, and Utah comes in with 91.67% (the 1976 figure was not available for Utah)?

Furthermore, "scaled scoring" can be discarded with no apparent ill effects which is what Arizona has apparently done. Thus, on the February and July, 1982 examinations, a pre-set score of 120 or more correct answers, out of 200 Multistate examination questions, was an automatic pass for that part of the examination. Similarly, each essay question was graded on a "pass" or "fail" basis. Seven "pass" scores out of ten essay questions chosen from a field of thirteen questions was taken as a passing grade for the essay portion of said examinations, c.f., NCBE Brief at 24, fn.9.

Contrary to the alarmist exclamations of SBC, Brief at 6, 17; NCBE, Brief at 8-11, the displacement of scaled scoring by Arizona with pre-set standards that are not surreptitiously manipulated by "raw scores" has not ended the bar examination, nor affected the quality of applicants admitted to practice law in Arizona.

Whatever the excuses given, "scaled scoring" is nothing more than a tool to control the numbers of admitted attorneys for sheer anticompetitive purposes. If equalization was the method's inevitable result, the pass percentages for California, Utah, Texas and New Mexico, as for all other States using a combination of the Multistate examination and essay examination should be very nearly identical from examination to examination and from year to year; but, they are not!

2. On Active Supervision

In the foregoing, it has been demonstrated that Petitioners fail the first prong of either the Midcal test, or their own test, Argument, §I.D., supra; therefore, the question of whether Petitioners were subject to active supervision is possibly moot. However, Petitioners, Brief at 50-53; SBC, Brief at 16, 19-20, and NCBE, Brief at 26-27, all address the question of what

type of supervision, if any, is required for persons such as Petitioners or for an agency on which they served. As noted by SBC, Brief at 19, the question of the degree of supervision required for governmental agencies or officials is unresolved by this Court.

Contrary to SBC's position, Brief at 16, and Petitioners' argument, Brief at 52, Ronwin does not suggest that "every regulatory detail" need be supervised; nor would that be a fair reading of the Midcal supervision requirement.

Since the question is intrinsic to the Midcal test featured herein and as this Court may wish to consider the question, even though it received scant attention below, Ronwin proffers the following:

The degree of supervision required for political subdivisions, agencies and officials will probably need an ad hoc determination in each case.

Analysis of the Midcal test reveals that both prongs are intertwined and that the test is as applicable to public bodies and officials as to private entities. This Court's cases reviewed at 15-20, supra, have stressed, in evolving language, the essential ingredient for state-action exemption: clear articulation and affirmative expression of the anticompetitive policy by the sovereign. The active supervision prong of the Midcal test is vital, regardless of whether public or private entities are involved, to ensure that it is the sovereign organs of the State and not other State agencies, or private parties, that clearly articulate and affirmatively express the State's anticompetitive policy. De minimus, that consideration gives rise to the need for active supervision which includes a requirement that the non-sovereign unit or individual, official or private, provide advance, overt

notification of record to the sovereign unit or individual of the detailed substance of any action, policy or decision whose intended introduction or enforcement is known, or should be known, to have an anti-competitive purpose and/or effect; and, concomitantly, the sovereign ought to be required to signify by a declaration of record its approval or disapproval prior to the initiation or effectuation of the action, policy or decision.

Active supervision needs to be particularly strict where, as herein, "officials" who are essentially full time practitioners of the profession or occupation, have an intrinsic, beneficial, economic interest in promoting anticompetitive schemes, see 40-41, supra; or, where, as here, a private guild, NCBE, exerts considerable and powerful influence on public bodies or officials, NCBE Brief at 3-5, and which, beyond the normal process of democratic selection, in-

serts itself into the body politic of the State's subdivisions and from that vantage point can and does cause harm and injury to the constitutional and other rights of citizens with relative impunity.

II. ON THE ASSUMPTION, ARGUENDO, THAT THE ISSUE IS PROPERLY BEFORE THIS COURT, AS PETITIONERS ARGUED IN THEIR PETITION FOR CERTIORARI AT 18-20, AND IN THEIR BRIEF AT 74-87, IS THE NOERR-PENNINGTON DOCTRINE APPLICABLE TO PETITIONERS?

Petitioners claim that the Noerr-Pennington doctrine immunizes their recommendations regarding bar admissions, Petitioners' Brief at 74-87.

As Petitioners noted in their Petition for Certiorari at 18, fn. 9, the Noerr-Pennington issue was raised for the first time in two amicus curiae briefs in the Ninth Circuit. By order of the Ninth Circuit, Ronwin could not either challenge the raising of the issue in that manner or res-

pond thereto, Order of the Ninth Circuit, filed July 29, 1982 (see Appendix to Ronwin's Brief in Opposition to Petition for a Writ of Certiorari, A-3, ¶'s (1) and (4)). Petitioners, themselves, first raised the issue in this Court in their Petition for Writ of Certiorari at 18-20, and Ronwin responded, "on the assumption, arguendo, that the issue is properly raised before this Court..," Ronwin's Brief in Opposition to Petition for Writ of Certiorari at 22. Notably, the Ninth Circuit decision, Ronwin,686 F.2d at 692 totally ignored the raising of the issue by the amici and Ronwin submits that the issue is not properly before this Court. However, as this Court may hold otherwise, Ronwin hereby responds:

In advancing the purported defense of Noerr-Pennington, Petitioners raise sophistry to a new height!

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127,

81 S.Ct. 523, 5 L.Ed.2d 464 (1961) proceeds on the theme, 365 U.S. at 135:

> ..that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws.

Noerr drew a distinction between associations having as their purpose attempts to induce "particular action with respect to a law that would produce a restraint..," and combinations normally held violative of the Sherman Act, 365 U.S. at 136.

United Mine Workers of America v. Pennington, 381 U.S. 657, 669, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965) follows Noerr.

The fact situations in both cases are totally dissimilar to the case at bar and both cases are inapplicable to this action.

Ronwin has not challenged Petitioners' right protected by Noerr and by Pennington to make a recommendation on Ronwin's application as being violative of antitrust law; rather, Ronwin has challenged the actual,

anticompetitive grading scheme employed by Petitioners without authorization and in disregard of the policy stated in the applicable rules, Argument, §I.D., supra, whether said rules are Ronwin's version or Petitioners' version, Argument, §I.A., supra. That anticompetitive behavior is not shielded by Noerr-Pennington.

Petitioners argue, as they did in their Petition for Writ of Certiorari at 20, fn. 11, that:

> Ronwin made no effort to plead that petitioners' acts fell within the 'sham' exception to Noerr-Pennington, and could not do so..., Petitioners' Brief at 82.

One reason why Ronwin made no effort to plead the "sham" exception is that the pleading took place in the courts below and the issue was (i) not raised in the trial court but was (ii) raised for the first time in two amicus briefs in the Ninth Circuit, as Petitioners admitted, Petition for Writ of Certiorari at 18, fn.9.

As shown above at 62-63, Ronwin was not permitted to respond to said amicus briefs. For those reasons and the question of whether the issue was properly before the Ninth Circuit or this Court, Ronwin made no effort to plead the "sham" exception.

Noerr discusses the "sham" exception, 365 U.S. at 144, 81 S.Ct. at 533. In City of Kirkwood v. Union Electric Co., 671 F.2d 1173, 1181 (8 Cir. 1982), reh. den., the Court's comments are aimed at the sham exception:

> The Noerr-Pennington doctrine protects the First Amendment right to petition government authorities, but later cases demonstrate that the First Amendment does not immunize all attempts to manipulate the government for anti-competitive ends. * * * Noerr protects the right to make one's views known to the government, but Cantor and Trucking Unlimited make clear that the right may not be used as a pretext to achieve otherwise unlawful results. 'If the end result is unlawful, it matters not that the means used in violation may be lawful.' Trucking Unlimited, 404 U.S. at 515, 92 S.Ct. at 614. The Noerr-Pennington doctrine will not protect a utility which manipulates the federal and state regulatory processes

> to achieve anti-competitive results. It is not for expression of opinion that [Ronwin] seeks to compel [Petitioners] to respond in damages, but rather for [Petitioners] conduct in the market place.

Since Rule 28(c)VIII, Ronwin's version, 6-7, App., states that those who obtain a grade of 70 and otherwise are found qualified "..shall be recommended for admission to the Bar," and, as Petitioners' adopted seventy as the passing grade, assuming their version of the rules apply, 7-9, App., and 14,29-30, supra, Petitioners' recommendations are commanded and can hardly be classified as attempts "to influence" judicial policy.

It is also clear from Noerr that the attempts to influence which enjoy immunity are in the nature of "political" efforts. Thus, Noerr explains, 365 U.S. at 140:

> Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly

into the category of political activity.

Petitioners' "recommendations" activity hardly constitutes "political activity."

Whether or not the "sham" exception is applicable to Petitioners, Petitioners' whole attempt to clothe themselves with Noerr-Pennington doctrine immunity is a transparent sham.

III. CAN A STATE EVER USE ANY PROFESSIONAL OR OCCUPATIONAL LICENSING EXAMINATION, OR ANCILLARY PROCEDURE, FOR THE PRIMARY PURPOSE OF LIMITING THE NUMBER OF LICENSEES RATHER THAN TO DETERMINE THE INDIVIDUAL QUALIFICATIONS TO PRACTICE OF EACH APPLICANT?

Ronwin raised this question in Ronwin's Response to Petitioners' [First]"Petition for Rehearing..." submitted to the Ninth Circuit at 10-12; and, again in Ronwin's Supplemental Response to said Petition for Rehearing, at 4. Ronwin also raised the

question in his Cross-Petition for a Writ of Certiorari, at 14-16, in this Court's cause no. 82-1573, which Writ was denied.

In Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 238, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957), this Court barred exclusion from the practice of law by manners or for reasons which contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment and required that qualifications demanded of bar applicants, and presumably the standards and tests therefor, have a "rational connection with the applicant's fitness or capacity to practice law," 353 U.S. at 239, 77 S.Ct. at 756. In Greene v. McElroy, supra,360 U.S. at 492, 79 S.Ct. at 1411, this Court declared the right to follow a chosen profession free from unreasonable governmental interference to be within the compass of the liberty and property concepts of the Fifth Amendment. The Court

eloquently reminded us of the due process principles which govern determinations of the right to pursue a profession, Greene, 360 U.S. at 496-497, 79 S.Ct. at 1413-1414. This Court explained that the right to enjoy property without unlawful deprivation, no less than the right to speak or to travel, is a "personal" right, Lynch v. Household Finance Corp., 405 U.S. 538, 552, 92 S.Ct. 1113, 1122, 31 L.Ed.2d 424 (1972), reh. den. 406 U.S. 911.

Most apropos, are the observations in Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963), which hold "admission to the bar of a state" to be a "right," 373 U.S. at 102, 83 S.Ct. at 1179.

In sum, the thrust of this Court's decisions is that the right to admission to a Bar and the right to pursue a profession flow from the personal rights to due process and equal protection under the Fifth

and Fourteenth Amendments.

Consequently, any examination for professional or vocational licensure must examine the applicant for his own abilities and not allegedly determine the applicant's abilities to practice by any scheme or procedure which, in effect, measures those abilities by their relative standing in a group or by grading on a curve.

As the Ninth Circuit noted, Ronwin had pled that the grading of the February, 1974 bar examination was such that a predetermined number of persons were passed without regard to "..achievement by each Bar applicant of a pre-set standard [of competence]," Complaint, ¶VI, J.A. 10; Ronwin, 686 F.2d at 695.

Hence, Petitioners' grading activity was more than an unauthorized, anticompetitive activity; it was an assault on the Fifth and Fourteenth Amendment rights of bar applicants to have the question of their

ability to practice law determined on the basis of their own qualifications.

It is submitted that no examination or other procedure for licensure to practice any profession or occupation, may, consonant with the Fifth and Fourteenth Amendments be of such text or design, and/or be so graded, as that anything is measured or determinative of passage of the examination, other than the individual achievement of the examinee without regard for, or contribution from, the results of any other examinee on the same or on a prior examination.

The Ninth Circuit did not directly address this issue but it is pregnant in this case. Furthermore, the right to practice a licensed profession or vocation affects substantial numbers of citizens; and, there are continual rows over licensing decisions in all fields. The issue merits this Court's attention, this Court's Rule 34.1(a).

IV. THE NINTH CIRCUIT ERRED IN AFFIRMING THE DISMISSAL OF THE SPOUSES OF THE INDIVIDUAL DEFENDANTS.

This matter was raised by Ronwin in his Cross-Petition for a Writ of Certiorari, No. 82-1573, which was denied by this Court; however, if Ronwin has stated a cause of action against Petitioners and if Ronwin prevails at trial, this issue will have significant effect on Ronwin's potential to collect damages from the Petitioners, (all of whom are married) as a consequence of Arizona's view of community property.

As the dissent noted, Ronwin, 686 F.2d 701, fn. 1, J.A. 137, in Arizona, unless a prevailing plaintiff names the spouses as co-defendants [even if such spouses took no actual, personal part in the events giving rise to the cause of action], the prevailing plaintiff is estopped from looking to the community property to satisfy the damage obligation, A.R.S., §25-215(D);

Eng v. Stein, 123 Ariz. 343, 599 P.2d 796, 799 (1979). Ronwin pled that the Petitioners acted on behalf of their respective marital communities, J.A. 8, and thereby named the spouses, J.A. 5-6. Whether Petitioners acted on behalf of their communities is a fact question, Howe v. Haught, 11 Ariz. App. 98, 462 P.2d 395, 397 (1970). The Ninth Circuit had no basis in the record for determining that fact question; and, as above, Ronwin's allegation of community involvement was sufficient to require the spouses to remain joined. Nevertheless, the Ninth Circuit dismissed the spouses on the grounds that "no specific wrongdoing" was alleged against them, Ronwin, 686 F.2d at 694, fn. 1.

The judgment of the Ninth Circuit carries the force of law. Does said judgment mean with respect to the dismissal of the spouses that, as with the Act of Congress involved in Wissner v. Wissner, 338 U.S. 655, 70 S.

Ct. 398, 94 L.Ed. 424 (1950) and as with the Treasury regulations involved in Free v. Bland, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962), the community property laws of Arizona, in particular A.R.S. § 25-215(D), do not hold as to federal practice in Arizona and do not require joinder of spouses as co-defendants in federal suits in order to reach a defendant's share of his or her community property? If not, then, there was no basis for the Ninth Circuit's affirmance of the dismissal of the spouses and said action should be reversed.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision should be affirmed and the Ninth Circuit's dismissal of the spouses should be reversed. The Feldman case should be overruled. Use of any examination for professional or occupa-

tional licensing which by grading or by text or otherwise does not measure individual abilities to practice should be declared an unconstitutional activity. The Midcal test, with an added prong requiring the sovereign to explain its compelling need to adopt an anticompetitive measure, should be declared the test for state-action exemption applicable to official or private parties.

Respectfully submitted,

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(Appendices follow)

APPENDIX

STATUTORY PROVISIONS AND RULES INVOLVED (Additional to and amplifying those found in Petitioners' Brief on the Merits)

UNITED STATES CONSTITUTION:

Fifth Amendment

No person shall...be deprived of life, liberty, or property, without due process of law...

Fourteenth Amendment

..No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES:

15 U.S.C. §1. Trusts, etc., in restraint of trade illegal; (as in effect prior to December 21, 1974).

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *

Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c.647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c.281, 69 Stat.282.

And, as amended December 21, 1974, Pub.L. 93-528 §3, 88 Stat.1708: (The December 12, 1975 amendment,Pub. L. 94-145 §2, 89 Stat.801, deleted the anti-trust exemption to State

Fair trade laws which are deleted from the above text).

§1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the Several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

ARIZONA REVISED STATUTES:

§12-109. Promulgation of rules of pleading, practice and procedure; distribution

A. The supreme court, by rules promulgated from time to time, shall regulate pleading, practice and procedure in judicial proceedings in all courts of the state for the purpose of simplifying such pleading, practice and procedure and promoting speedy determination of litigation upon its merits. The rules shall not abridge, enlarge or modify substantive rights of a litigant.

B. The supreme court shall print and distribute the rules to all members of the state bar and to all other persons who apply.

C. The rules shall not become effective until sixty days after distribution.

Source: Laws 1939, Ch.8, §3
Code 1939, §19-204

§12-111. Statutes as rules of court

All statutes relating to pleading, practice and procedure shall be deemed rules of court and shall remain in effect as such until modified or suspended by rules promulgated by the supreme court.

Source: Laws 1939, Ch.8 §3.
Code 1939, §19-204.

ARIZONA SUPREME COURT RULES:

(All in Volume 17A, Arizona Revised Statutes)

(Rules as contended by Ronwin to have been in effect during the February, 1974 bar examination)

Rule 28. Examination and Admission

28(a) Committee on examinations and admissions; powers and duties. The examina- and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such purpose, a committee on examinations and admissions consisting of seven active members of the state bar shall be appointed by this court.

* * *

The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of govern-

ors as approved by this court respecting examinations and admissions * * * The court will then consider the recommendations and either grant or deny admission. Amended,effective Sept. 15, 1970.

Rule 28(c)VII

Examinations will be upon the following subjects: Contracts, Torts,Criminal Law, Equity, Agency-Partnership, Wills and Administration, Professional Responsibilities, Pleading and Procedure, Constitutional Law, Evidence, Private Corporations (including State and Federal regulations regarding issuance and sale of corporate stock), Property (including Real and Personal Property, Community Property Laws and the Uniform Commercial Code in relation to property law), Trusts, Federal Income Tax, Conflict of Laws.

Rule 28(c)VIII

The semi-annual examinations in February and July shall be in writing. All applicants who receive a grade of seventy or more in

the general examination (all subjects except professional ethics) and who receive a grade of seventy or more in professional ethics and who are found to be otherwise qualified under these rules shall be recommended for admission to the Bar. (Adopted April 1,1967; amended effective Aug. 1, 1970).

(Rules as contended by Petitioners to have been in effect during the February, 1974 bar examination. The following version of the rules are dated January 11, 1974 and allegedly made effective January 15, 1974; see Argument, §I.A, supra. A certified copy of the order containing this version of the rules is attached to Petitioners' (First)"Petition for Rehearing..." filed in the Ninth Circuit phase of the case).

Rule 28(a). The text is identical to that in Ronwin's version, 5-6,App.

Rule 28(c)VII

A. Examinations will be upon the following subjects:

* * *

(deleted portion identical to the text in Ronwin's version, 6,App.)

The Committee may utilize the Multi-State Bar Examination sponsored by the National Conference of Bar Examiners and may utilize such grading and scoring system as the Committee deems appropriate in its discretion.

B. The Committee on Examinations and Admissions will file with the Supreme Court thirty (30) days before each examination the formula upon which the Multi-State Bar Examination results will be applied with the other portions of the total examination results. In addition the Committee will file with the Court thirty (30) days before each examination the proposed formula for grading the entire examination.

Rule 28(c)VIII

A. The semi-annual examinations shall not be oral. All applicants who receive a passing grade in the general examination

(all subjects except Professional Responsibilities) and who also receive a passing grade in Professional Responsibilities and who are found to be otherwise qualified under these Rules shall be recommended for admission to the Bar.

IN THE SUPREME COURT OF THE STATE OF ARIZONA

ORDER ADOPTING AND PROMULGATING RULES OF THE SUPREME COURT OF THE STATE OF ARIZONA

Pursuant to Laws 1939, Chapter 8,§§1,2, 3(19-202 through 19-204, Arizona Code Annotated 1939), IT IS ORDERED:

1. That the Rules of the Supreme Court of the State of Arizona hereto annexed be and they are hereby adopted and promulgated as Rules of the Supreme Court of the State of Arizona.

2. That the Rules hereby adopted and promulgated shall take effect and be in force on and after twelve o'clock midnight December 31, 1955.

3. That a copy of the annexed Rules shall be distributed to all members of the State Bar of Arizona, and to all persons who apply therefor, not later than sixty days before such Rules become effective and in force.

DATED AND ENTERED at the City of Phoenix, the Capitol of the State of Arizona, this 18th day of June, 1955.

/s/ Arthur T. La Prade
Chief Justice

/s/ Levi S. Udall
Judge

/s/ Dudley S. Windes
(SEAL) Judge

/s/ M.T.Phelps
Judge

/s/ Fred C. Struckmeyer,Jr.
Judge

Attest:
/s/ Eugenia Davis
Clerk

(Copy of above appears at p.2, Vol 17A, Arizona Revised Statutes and on p. 464 of the soft-bound "pamphlet" labelled "Arizona Rules of Court", 1982 version of the rules;

said "pamphlet" accompanies and is part of the complete set of the Arizona Revised Statutes which is the official publication of same).

Passing Percentage Results for the Arizona State Bar Examinations from 1973-1976, inclusive. Taken from National Bar Examination Digest, supra, at 14:

	1976	1975	1974	1973
Winter	70	76	54	70
Summer	58	76	76	83

If "equalization" occurred, rather than use of the examination for anti-competitive purposes in February, 1974, then the results would read:

	1976	1975	1974	1973
Winter	70	76	75*	70
Summer	75*	76	76	83

*- average obtained by deleting the 54% in Winter, 1974 and the 58% in Summer, 1976.

Comparison of the Passing Percentage Results on the bar examinations of the States of California, Utah, Texas and New Mexico for the years, 1973 to 1979, inclusive:

CALIFORNIA

	'79	'78	'77	'76	'75	'74	'73	Av.
Winter	44	38	44	37	43	51	50)	
							)	50.21%
Summer	52	52	55	59	61	62	55)	

UTAH

Winter	94	85	87	--	83	94	96)	
							)	91.67%
Summer	89	93	93	--	94	94	98)	

TEXAS

Winter	86	87	86	90	89	87	90)	
							)	
Summer	85	90	86	79	91	90	93)	87.76%
							)	
Fall					90	86	87)	

NEW MEXICO

Winter	71	62	70	79	70	79	70)	
							)	71.71%
Summer	83	67	69	66	67	76	75)	

Data taken from: For years 1973-1976, National Bar Examination Digest, supra, pp. 15,36,43,44. For years 1977-1979, BAR/BRI Digest, supra, pp. 7,26,35,36.